IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1324

ALLSTATE INSURANCE COMPANY, *Petitioner,*

v.

JOSEPH A. CANNATA, *Respondent.*

On Petition for a Writ of Certiorari to the Court of Appeals of the State of California, First Appellate District, Division Three

---

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT D. BARBAGELATA
BARBAGELATA, CARMAZZI, ARNOLD & DEL BINO
109 Geary Street, 4th Floor
San Francisco, California 94108

EUGENE GRESSMAN
1828 L Street, N.W.
Washington, D. C. 20036

Counsel for Respondent

May 18, 1977

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

16059-5-77

INDEX

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1324

ALLSTATE INSURANCE COMPANY, *Petitioner,*

v.

JOSEPH A. CANNATA, *Respondent.*

On Petition for a Writ of Certiorari to the Court of Appeals of the State of California, First Appellate District, Division Three

---

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Joseph A. Cannata respectfully suggests that certiorari be denied in this proceeding for the reason that the totality of circumstances disclosed by the record fails to support the questions tendered in the petition for certiorari. Cf. *Baldonado* v. *California,* 366 U.S. 417 (1961).

QUESTION PRESENTED

The sole question now relevant is whether the record of the trial and appellate proceedings in the California courts permits this Court to entertain or resolve the two federal pre-emption questions presented by the petition for certiorari.

RESTATEMENT OF THE CASE

Neither the opinion below nor the petition for certiorari gives a complete accounting of how this case arose. And the petition most certainly does not accurately reflect the desperate and belated attempt of the petitioner Allstate—after all had been lost at the jury trial—to reconstruct the case as if it had been a federal pre-emption matter from the start.

For the convenience of the Court, the relevant history of this prolonged litigation is annexed as an appendix to this brief, p. 1a, *infra*. The critical elements of this story of a post-trial attempt to create a federal pre-emption issue may be summarized as follows:

(1) In 1968, petitioner Allstate summarily terminated the employment of the respondent Cannata as a claims adjuster and supervisor. It did so on the sole stated ground that Cannata had repeatedly criticized Allstate's claims practices and underwriting procedures, which Cannata considered to be immoral and unethical. Allstate deemed such criticisms to be indicative of Cannata's "negative attitude" and "disloyalty" toward his employer.

(2) The record is barren of any evidence that the termination was in any way motivated by any pro-union activities or statements on the part of Cannata. Most certainly, at the time of the discharge in 1968, Cannata

was not told that any pro-union proclivities he might have had were among the reasons for termination. And Allstate's own memorandum of the termination interview confirms that termination was due solely to the reports of his negative and disloyal attitudes toward the claims practices and underwriting procedures.[1]

(3) Cannata brought this action in 1969 in the California state courts, alleging two causes of action for breach of oral contract and two for fraudulent misrepresentations about the conditions of employment. No allegations appeared in the complaint concerning union activity by Cannata, and none was asserted as a defense in the Allstate answer. While Allstate made various pretrial motions, at no time did it move or claim that the state court's jurisdiction over Cannata's action was pre-empted by the National Labor Relations Act.

(4) Extensive pretrial discovery, which extended over the ensuing five years, produced no evidence or claim that union activities or sentiments had been involved in any way in the 1968 decision to terminate Cannata's employment. Not until four days before the trial commenced in August of 1974 did the unionization matter first surface. At that point, as the opinion below notes (Pet. App. 7), Allstate suddenly discovered and produced a "misfiled document" that made rather obscure reference to Cannata's interest "in organiz-

---

[1] Whatever evidence was later introduced at the trial as to Cannata's pro-union sympathies was not shown to have played any role in his termination in 1968. Indeed, in his closing argument to the jury (p. 159), Allstate's counsel admitted that some of this evidence "probably was not actually known to the employer" at the time of the discharge.

ing" and to Cannata's brother being "a union organizer for unknown group." While this belatedly produced document was introduced as an exhibit at the trial, it was never shown to have been a factor in the decision to discharge Cannata.[2]

(5) Just before the commencement of the trial, counsel for both parties advised the trial judge of the discovery of this "misfiled document" and of its effect upon the evidence about to be produced. Cannata's counsel expressed concern that the sudden production of this document, said to have been misfiled for nearly seven years and then accidentally uncovered, indicated that Allstate was about to produce some semblance of evidence that Cannata may have been discharged for "union activities or at least being favorable to a union." But Allstate's counsel responded that it would be Allstate's case "that he was discharged for being less than a faithful employee. . . . and that he persistently refused to follow our suggestions that he direct his criticisms of those things he wished to criticize through proper channels." And, under Allstate's theory of the case as explained to the jury, any evidence about Cannata's union sympathies would relate to Allstate's conception of a loyal supervisor as being one who reported employee dissatisfactions to management

[2] This reference to Cannata and unions was contained in two short sentences, which were part of a handwritten four-page document. The author of the document, who was Allstate's home office personnel director, admitted that this information had come to him from a Mr. Kelly, who apparently got the information in turn from a Mr. Weidel. The director himself had no first hand knowledge of the matter. R.T. XIV, 1570. The petition for certiorari alludes to this information at page 4, but seemingly ascribes no great significance to it.

rather than "discussing unions and union organization with other employees."

(6) As the opinion below notes (Pet. App. 3), the entire thrust of Allstate's defense at the trial "was that Cannata was terminated for disloyalty to the company by being critical of its valid policies and, generally, because Cannata did not have the right attitude." The opinion also notes (Pet. App. 7) that the "vast bulk of evidence in this case addressed itself to Allstate's claims policies, personnel policies, agreements with Cannata, and damages." The question of Cannata's union sympathies, in the court's words (Pet. App. 7), "received only minimal attention"—the trial references to unions appearing on less than 125 of the 2,538 pages of transcript (Pet. App. 2). And even the slight attention paid this matter was always in the context of Allstate's concepts of loyalty and disloyalty, i.e., that the loyal supervisor will report employee dissatisfaction and employee discussion of unions rather than engage himself in union-related discussions.

(7) There were, to be sure, a few references in the trial record to Cannata's interest in unions and to his speculation upon whether unionism was going to take hold in the insurance industry or among claims adjusters. Cannata himself testified only that he was in general sympathy with unions, if someone asked him, R.T. XIV, 1470. But these references were not introduced to show that Cannata himself had engaged in any concerted union activity, and indeed there was no evidence whatever of any affirmative pro-union *activity* on Cannata's part. At most, there were a few isolated expressions of pro-union sympathy. More importantly, however, there was no attempt by Allstate at the

trial to tie these few oral expressions to the grounds for his termination in 1968.[3]

(8) To bolster its theory at the trial that Cannata, as a managerial supervisor, was "disloyal" in failing, among other reasons, to report discussions of unionism among Allstate's employees and the causes for employee dissatisfaction, Allstate obtained two special jury findings, though not in the form originally sought:

(a) *Whether Cannata, at the time of the termination, was a managerial or non-managerial employee.* Had the jury found he was a managerial employee, the jury would have indicated agreement with Allstate's attempt to portray Cannata as a disloyal supervisor. But the finding that he was a non-managerial employee was further evidence of the jury's repudiation—expressed by its general verdict—of all aspects of Allstate's disloyalty concept, particularly that which was rooted in its notion of the reporting duties of managerial supervisors.[4]

---

[3] The opinion below at one point (Pet. App. 2) refers to an incident where Cannata "once invited other adjusters to a meeting to discuss the possibility of organizing a union among the claims adjusters." But the record shows that this meeting occurred in another adjuster's home in 1964, more than four years before the termination, and that the discussion was nothing more than speculation as to whether unionism was going to take hold among insurance companies. R.T. XIV, 1468-1469, 1478. Allstate's counsel conceded at the trial that this meeting had not been brought to Allstate's attention until the trial in 1974; hence it could have played no role in causing Cannata's discharge.

[4] Among the jury instructions was the charge that the "expression and encouragement of pro-union sentiments by such a managerial employee in disregard of the employer's wishes or directions in that respect may constitute a breach of an employee's duty to the employer." Moreover, throughout the trial, Allstate urged that Cannata was a supervisor and thus "outside the scope of the NLRB." R.T. Vol. I, 53.

(b) *Whether "pro-union activity or statements" were "a material factor in the termination of employment" of Cannata.* This ambiguous question can be interpreted and read in two ways, as referring (1) to the activity or statements of Cannata himself, or (2) to the activity or statements of other employees which Cannata should have reported. The affirmative answer given by the jury, which was to become the fulcrum of Allstate's post-trial pre-emption argument, may well have reflected the jury's choice of the second reading of the question. The jury's answer thus would become the jury's way of saying that Cannata's failure to report "pro-union activity or statements" of other employees was a material but totally unjustified factor in the termination. The reasonableness of that interpretation of the question, and the answer, is shown by the fact that Allstate put this question to the jury in the context of its trial theory that Cannata had disloyally failed, as a managerial supervisor, to report the pro-union sentiments of other employees and to report the causes of their dissatisfaction that underlay their pro-union expressions. Moreover, since Allstate had not put forth any kind of a pre-emption defense at the trial, the question could not have been put to the jury in support of any defense theory that Cannata was discharged for having exercised his rights under Section 7 of the National Labor Relations Act.

(9) After the jury had found in Cannata's favor and determined that he was entitled to substantial damages for Allstate's breach of the contract and its flagrant and fraudulent misrepresentations, Allstate began to shift its entire theory of the case. In its motion for a new trial, Allstate for the first time made the claim that one of the "reasons" for terminating

Cannata had been his so-called "advocacy of union organization." Prime reliance was now placed on the jury's special finding that pro-union statements had been a material factor in the discharge. And it was in this post-trial motion that Allstate originated its argument that the state court's jurisdiction over the case was pre-empted, since discharge of an employee for pro-union activity or statements is arguably subject to the National Labor Relations Act.

(10) While this belated pre-emption point was only one of some ten grounds of Allstate's appeal from the jury's verdict, the pre-emption arguments were escalated at each stage of the state appellate proceedings. The culmination of this pre-emption afterthought is exhibited in the petition for certiorari filed by Allstate in this Court. Totally ignoring the other bases of the lower court's affirmance of the judgment (see Pet. App. 8-12), Allstate now condemns itself as an employer who discharged an employee in 1968 because of his pro-union activity and statements. That exercise in self-flagellation is traceable solely to an exploitation of a 1974 jury finding, which is said to reveal what neither party knew in 1968—i.e., that the termination was in material part due to a federally proscribed employment discrimination. And the refusal of the California courts to accept this post-rationalization of counsel is viewed (Pet. 25) as an effort by California once again "to secede from that national system in *Garmon*."

REASONS WHY THE WRIT SHOULD BE DENIED

The totality of circumstances revealed by the record demonstrates the inappropriateness of granting certiorari. This is simply not a labor pre-emption case; and

no amount of piecing together certain remarks in the opinion below and the special finding of the jury—as petitioner has attempted to do—can fill the factual void that surrounds the pre-emption questions posed in the petition for certiorari.

1. There Is No Evidence in This Case that Cannata Was Discharged for Having Engaged in Any Concerted Activity Within the Scope of the National Labor Relations Act.

The voluminous record in this case makes it abundantly clear that Cannata's discharge was due solely to what Allstate considered to be his "negative attitude" and "disloyalty" with respect to Allstate's claims practices and underwriting procedures. There is not one item in the record to support Allstate's present contention that it terminated Cannata's employment in 1968 because of any pro-union statements on his part. Eloquently underlining the absence of such evidence is the fact that Allstate's attempt to rely on those pro-union statements never surfaced until after the trial—six years after the termination.

Even those statements, if they be accorded any significance, do not rise to the federal level of constituting "substantial evidence in the record showing that the employee was engaged in concerted activity for the purpose of mutual aid and protection and that the employer had some knowledge of this at the time of discharge." *N.L.R.B.* v. *Buddies Supermarkets, Inc.*, 481 F.2d 714, 717 (C.A. 5, 1973). Cannata's few and isolated pro-union remarks, leaving aside their hearsay nature, "can properly be classified as individual griping or complaining," *id*, outside the scope of federally protected employee rights under § 7 of the National Labor Relations Act. Indeed, the evidence is conclu-

sive that Allstate, at least when the evidence surfaced at the trial, viewed Cannata's remarks only as further evidence of Cannata's "disloyalty" to his employer; under that strange "disloyalty" policy, Cannata as a supervisor was to report the dissatisfaction underlying anyone's talk about unions and not engage in any union discussion himself.

The court below perceived this fatal flaw in Allstate's belated pre-emption argument. After reviewing the entire record, it concluded that it could not say "that Cannata's discharge was arguably an unfair labor practice within the meaning of the Act, thereby depriving the state court of jurisdiction." Pet. App. 7. That conclusion, which is premised on a thorough factual inquiry, need not be reviewed by this Court. The court below showed a total familiarity with the labor pre-emption doctrine, as exemplified in the decisions of this Court. It simply found the evidence in this case inadequate to support application of the established pre-emption principle.[5]

2. The Jury's Special Finding that Pro-union Activity or Statements Were "a Material Factor" in His Termination Does Not Detract from the Totally Factual Nature of This Case.

The petition for certiorari is structured in large part upon the jury's special finding, sought by Allstate, that "pro-union activity or statements" were "a material factor in the termination" of Cannata. The petitioner adds to that finding certain remarks in the opinion below (a) that this finding "was supported by substantial evidence" (Pet. App. 4), and (b) that there was evidence "that Allstate was at least attempting to

[5] As Mr. Justice Holmes succinctly said for the Court, "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

'chill' the employee's right under section 7, if not in fact interfere with that right" (Pet. App. 7). From those elements, Allstate continues its post-trial argument that Cannata's discharge was arguably an unfair labor practice within the meaning of the federal labor statute.

That argument, however, misconceives the nature and the context of the special finding, as well as the limited sanction given the finding by the court below. Allstate requested this kind of finding to bolster its trial defense that Cannata was "disloyal" in not reporting union discussions and that, combined with the other major factors of "disloyalty" in the form of Cannata's vigorous criticisms of Allstate's claims practices and underwriting procedures, Cannata's termination was justified as a matter of company policy. In other words, the finding was not sought to support any claim—which had not been made at the time—that Cannata's discharge was arguably due to Allstate's distaste of Cannata's union sentiments.

The jury may well have thought that it was saying "yes" to whether Cannata's termination on grounds of "disloyalty" was due in material part to his failure to report to Allstate the "pro-union activity or statements" of other employees. Indeed, that was precisely part of the closing plea to the jury by Allstate's counsel, who urged that supervisors like Cannata "were required to report any indications of gripes which would lend themselves to . . . an organizing drive or sign-up of employees of Allstate in the union" (p. 157), and that certain evidence indicated that "Cannata had further information at this point of other union activities . . . and he should have mentioned them" (p. 162) to his supervisors.

The jury, in short, may well have thought that it was not being asked whether Cannata's own pro-union statements contributed materially to his discharge. If so, the finding is a totally inadequate base upon which to structure a federal pre-emption argument. Moreover, the rather ambiguous framing of the finding may well have misled the court below into searching for evidence to support what Allstate had never claimed at the trial—i.e., that Cannata's own pro-union sentiments contributed materially to his discharge. And this ambiguous finding may also have led the court below to search for evidence of still another claim never advanced by Allstate—i.e., a "chilling" by Allstate of Cannata's Section 7 rights.

At the same time, these broad but misguided references in the opinion below to employment discrimination and the chilling of Section 7 rights do not by themselves create the necessary factual climate for this Court's review of such matters. This Court "reviews judgments, not statements in opinions," *Black* v. *Cutter Laboratories, Inc.*, 351 U.S. 292, 297 (1956); and this Court's power "is to correct wrong judgments, not to revise opinions." *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945). Thus it takes something more substantial than what appears in this record to justify any review by this Court of the colorful and broad language used by the court below in substantiating the special finding.[6] In short, the record simply does not support those judicial statements. More importantly, the judgment

[6] As was said in *Black* v. *Cutter Laboratories, Inc.*, 351 U.S. 292, 298 (1956), "At times, the atmosphere in which an opinion is written may become so surcharged that unnecessarily broad statements are made. In such a case, it is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests."

below does not rest upon those statements. The judgment was that the record as a whole, including the special finding, did not warrant the conclusion that "Cannata's discharge was arguably an unfair labor practice." Pet. App. 7.

The controversy about the meaning and effect of the special finding, and whether it was "surplusage," only emphasizes the essentially factual and therefore unreviewable nature of this case. What effect a state court gives to an ambiguous jury finding in the unique circumstances of this case does not create an issue of national significance, warranting the grant of certiorari.

And the lower court's ultimate conclusion that Cannata's pro-union sentiment was "peripheral to the case" does not rise above the factual parochialism of this case. The instant case simply presents an inappropriate vehicle for seeking further clarification, if any be needed, of the federal pre-emption doctrine. The court below recognized the limited significance of its own opinion, for it directed that the opinion not be published in the official reports. Pet. App. 1.

3. In Any Event, California Has Asserted No Interest Here that Interferes with the Paramount National Labor Policies.

The federal pre-emption doctrine is aimed only at state regulation of conduct "plainly within the central aim of federal regulation." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244 (1959). If the activity regulated by the state is of "a merely peripheral concern" of the Labor Act, or touches interests so "deeply rooted in local feeling and responsibility" that only a compelling congressional direction can predominate, the pre-emption doctrine is inapplicable. *Id.*, at 243-244. And an assessment of whether

the national or state interests prevail "must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies." *Vaca* v. *Sipes*, 386 U.S. 171, 180 (1967).

On that basis, the correctness of the decision below is readily apparent. The national labor policies are in no way concerned or embarrassed if California permits a discharged insurance claims adjuster to recover damages for an egregious breach of an employment contract, compounded by flagrant and fraudulent misrepresentations that induced the employment contract. Particularly is that true where the termination is accompanied by no claims or overtones of union discrimination. See *Linn* v. *Plant Guard Workers,* 383 U.S. 53 (1965) (state libel action not pre-empted); *Automobile Workers* v. *Russell*, 356 U.S. 634 (1958) (state action for malicious and violent interference with lawful occupation not pre-empted); *Farmer* v. *United Brotherhood of Carpenters*, No. 75-804, 45 Law Week 4263 (1977) (state action for intentional infliction of emotional distress not pre-empted).

No provision of the National Labor Relations Act would have protected Cannata from his termination in 1968. There is no provision in Section 8 of that Act that makes it an unfair labor practice for Allstate to fraudulently induce the formation of an employment contract and then to unfairly breach that contract. Such a state cause of action, like the tort action in the *Farmer* case, is simply "unrelated to employment discrimination." 45 Law Week at 4267.

California, on the other hand, does have a substantial interest in protecting its citizens from the kind of abuse of which Cannata complained. See *Farmer, supra,* 4266. That interest is no less worthy of protection because an employer like Allstate makes a belated claim long after the discharge that it was really guilty of employment discrimination. To permit an employer to rewrite its own termination history so as to escape the state court consequences of its illegal acts is to make a mockery of the federal pre-emption doctrine.

The decision below is thus eminently correct. The court found more than enough evidence to sustain the jury's verdict that Allstate improperly breached the contract and was guilty of massive "malicious and fraudulent misrepresentation," particularly with reference to Cannata's participation in Allstate's profit-sharing fund. The court also found that the award of damages, though substantial, was not disproportionate to the injuries suffered by Cannata. Those, of course, are matters beyond the review jurisdiction of this Court. But they may constitute sufficient nonfederal grounds to justify the result reached.

CONCLUSION

For these various reasons, certiorari should be denied.

Respectfully submitted,

ROBERT D. BARBAGELATA
BARBAGELATA, CARMAZZI, ARNOLD & DEL BINO
109 Geary Street, 4th Floor
San Francisco, California 94108

EUGENE GRESSMAN
1828 L Street, N.W.
Washington, D. C. 20036

Counsel for Respondent

May 18, 1977

APPENDIX

APPENDIX

I

Statement of Facts

In 1960, the Respondent, JOSEPH A. CANNATA, had an offer of employment pending with Lockheed Aircraft Company when he went to ALLSTATE seeking employment. (R.T. Vol. III, 180). He wanted job security and a company through which he could get into a pension plan to secure his financial future. (R.T. Vol. III, 181). He was sent to the Menlo Park Regional Office, where he was told that ALLSTATE was in need of honest, ambitious, capable, hard working individuals and that if he came to work for them he would have job security, that it would be a permanent position, that he could make his career with ALLSTATE and that he could stay with them until retirement if he followed its directions, all of which would be lawful and ethical because ALLSTATE was a very fair and ethical company. (R.T. Vol. III, 185). He was also told that if his job was ever in jeopardy, he would be given notice and a reasonable time to make up any deficiencies, and that ALLSTATE was very fair and abided by these personnel regulations. (R.T. Vol. III, 186). He was told that he could join the Savings and Profit Sharing Plan for Sears employees and thereby have an interest in the company. (R.T. Vol. III, 188). He was further told that Thomas J. Kelly, Assistant Claims Manager, would have the authority to make the commitment for ALLSTATE. (R.T. Vol. XV, 1661). Mr. Kelly told him that ALLSTATE was a fair and ethical company and that in all its relationships to its insureds and third-party claimants, it was fair and ethical. (R.T. Vol. III, 190). He told plaintiff that ALLSTATE made fair settlements and that the adjusters were to tell the claimants that they were to receive a fair settlement from ALLSTATE and that, therefore, there was no need to involve an attorney. (R.T. Vol. III, 193).

Thomas J. Kelly in his testimony recalled that he told CANNATA that ALLSTATE was looking for people who were ambitious, honest and interested in a career with Allstate—one who would be with ALLSTATE until he retired. (R.T. Vol. IX, 862, 865).

Mr. Kelly explained to CANNATA that he would be expected to conduct himself as a gentleman and be honest; that because the philosophy of ALLSTATE was to be fair to both their insured and their claimants he would never be asked to do anything that would be illegal or immoral. He was also told that, if he abided by the rules and regulations, to the effect that he be fair with the people he dealt with and things of that sort, he could expect to work out his working career with ALLSTATE (R.T. Vol. IX, 867, 868), and that as long as he was ethical and honest in performing his function, ALLSTATE felt he would have a career with it. (R.T. Vol. IX, 869).

At the time Mr. Kelly made the above statements to CANNATA, ALLSTATE's claims practices and procedures were not lawful and ethical (R.T. Vol. IX, 872, 873 and 874). Mr. Kelly further stated that a written memorandum was put out by Mr. Krieg's office (Western Zone Vice President) to the effect that if an employee was over 50 years old and was not promotable to the next grade, that efforts should be made to either phase him out or terminate him if possible. (R.T. Vol. IX, 879, 880)

ALLSTATE has a form of advertisements for recruiting employees prepared by its advertising agency in Chicago, approved by ALLSTATE management and then put in the Standard Practice Manual (R.T. Vol. XIII, 22-23) which reads, in part, as follows:

> "ALLSTATE NEEDS MORE PEOPLE POWER . . . People who like success, but know success takes brains, ambition and a lot of hard work . . . if you are that kind of person, we'll pull out all the stops to get you where you want to go. We don't believe in putting limits on opportunity . . . There is no ceiling on where you can go . . . An Allstate employee can expect to retire with a fat nest egg from Sears Profit Sharing." (R.T. Vol. XIII, 24, Exhibit No. 19).

The job of Casualty Claims Adjuster was offered to CANNATA and he accepted that job in consideration for, and in reliance on, the representations that were made to him concerning ALLSTATE, its policy, and what would be expected of him. He was told that the ALLSTATE mandatory retirement age was either 62 or 63 and therefore, at that time, it was his intention to stay with ALLSTATE until he retired at either age 62 or 63. (R.T. Vol. III, 204, 205). He started work on October 3, 1960, at the San Francisco District Office where he spent his entire career with ALLSTATE. (R.T. Vol. III, 196) Within two years he was promoted to a Property Damage Examiner, but actually functioned as a Casualty Claims Examiner. (R.T. Vol. III, 197). In 1965, he was promoted to Casualty Claims Supervisor, after which he had an average of 1 to 3 people working for him. He stayed in that position until he was terminated on May 21, 1968. (R.T. Vol. III, 203).

CANNATA was never told by anyone that if he criticized ALLSTATE policies he would be in danger of losing his job. He felt free to criticize those policies that he thought to be wrong or unethical. One policy that he criticized strongly was the "OOPS" program, or the out-of-pocket expense system. (R.T. Vol. III, 213). Under this program, the adjuster was instructed to determine the "out-of-pocket" loss, and convey to the claimant that this loss was all he was "entitled to". (R.T. Vol. III, 212-217). He criticized this policy because the ALLSTATE adjuster was put into the position of having to lie and misrepresent both the law and the facts to the claimant or the insured. (R.T. Vol. III, 222).

CANNATA also criticized the policy used to dissuade a claimant from seeing an attorney. The adjusters would be instructed to "contact claimant fast and control him". He was critical of this because it was in direct violation of the provisions of the 'Statement of Principles on Respective Rights and Duties of Lawyers, Insurance Companies and Adjusters Relating to the Business of Adjusting Insurance Claims", adopted January 8, 1939. (R.T. Vol. III, 236, 237, 238)

CANNATA also criticized ALLSTATE's policy concerning the failure to pay policy limits in admitted liability cases. (R. T. Vol. IV, 265). (R.T. Vol. IV, 264). He objected to this practice because it constituted bad faith. (R.T. Vol. IV, 266). He also felt it was misrepresentation, because ALLSTATE assured their insureds that it was looking out for their interests when it wasn't—it was just looking out for ALLSTATE's interest. (R.T. Vol. IV, 267).

Another policy of ALLSTATE which he criticized was that where, when ALLSTATE knew the claim was worth more than the policy limits, it would notify its attorney not to inform them of such fact in writing. (R.T. Vol. IV, 270-272). In one instance, ALLSTATE told its attorney to tear up his file copy of such a letter, CANNATA criticized this policy to his superiors because it was destructive of the opinion of the attorney who was supposed to be representing the insured. (R.T. Vol. IV, 273).

CANNATA criticized ALLSTATE's policy of purposely stalling and procrastinating in the payment of medical pay coverage to its insured. His superiors told him that the purpose of this (R.T. Vol. IV, 276, 277) was to put the insured in an economic bind so that he would be more apt to settle his claim and to discourage him from carrying on his medical treatment because of the economic bind he was in. (R.T. Vol. IV, 282, 283).

Another ALLSTATE claims policy which was criticized, (R.T. Vol. IV, 86), was the hiring of a private investigating

firm like Retail Credit Company or Kraut and Schneider in order to make direct contact with a claimant represented by an attorney, when ALLSTATE was barred from making such contact by the "Statement of Principles, etc." (R.T. Vol. IV, 284, 285).

CANNATA was also critical of the practice of ALLSTATE which allowed another insurance company to review the files of ALLSTATE insureds without the insured's permission. This policy was reaffirmed at various times. (R.T. Vol. IV, 297, 298).

CANNATA also criticized Allstate's policy concerning the claim by an insured for damage to his automobile under the collision portion of his policy with ALLSTATE, (R.T. Vol. IV, 302), where the insured was required to go to a certain shop from which ALLSTATE demanded a discount in return for a volume of business. (R.T. Vol. IV, 302, 303)

CANNATA was also critical of the ALLSTATE policy of paying less than an insured was entitled to in the case of the total loss to the automobile of one of its insureds. (R.T. Vol. IV, 310).

CANNATA's Personnel File contained the following references to his criticism of ALLSTATE policies together with recommendations that he be terminated for such criticism:

(1) In a letter, dated April 10, 1967, from J. R. Crise, Menlo Park Regional Claims Manager:

> "As you know, we have had a serious attitude problem with this Supervisor for a long period of time. He expressed complete disapproval with our entire Severity Control Program at the last in-depth survey in January of this year. He continued to express this disapproval even after conferences with him by the Casualty Director and his Claims Superintendent . . .".
>
> We cannot tolerate this kind of attitude by a Super-

visors, but all of the adjusters in the office. I feel this has been discussed with him a sufficient number of times that no further discussion is necessary, and I recommend that we terminate this man immediately." (R.T. Vol. IV, 353, 354, Exhibit 5S).

The Severity Control Program is all of the policies and practices that ALLSTATE had for limiting the amount of money they would pay on claims and takes in all of the policies that plaintiff criticized. (R.T. Vol. IV, 355).

(2) In a Performance Evaluation on October 12, 1967:

". . . Joe will comply with company and regional company policy and procedures, but at times does not accept these principles and in turn cannot, or does not, sell them to his adjusters. On the other hand, if Joe is sold on these ideas, or accepts them himself, he can, and does, relate them effectively to his people . . . (R.T. Vol. V, Exhibit 5V).

(3) In a letter, dated October 13, 1967, from J. R. Crise:

"On October 12, Tom Payton and I conducted a Performance Evaluation on Casualty Supervisor, Joe Cannata, along the lines discussed by you, myself and Larry Williford . . .

. . . Tom then interjected that the reason he was rated in this category was because we sometimes got the impression that he would not sell his adjusters on Company policy in which he did not believe. He said that he would sell his men and did sell his men on everything we asked him to do. I then told him that I had read his complete file and that all throughout the file I saw the same point that Tom had just brought up. Joe then said that he would not say anything behind my back that he would not say to my face and that he was just more honest than the other supervisors who professed 100% cooperation but then said something else when

management was not there. He said maybe he was just stupid in being so honest, but he realized he had gotten a reputation as being a rebel for stating his honest feelings."

(4) In a letter, dated April 29, 1968, from J. R. Crise:

"I am enclosing a copy of a memorandum concerning Joe Cannata's recent conduct in the San Francisco office. As you know, when Chuck Kersgard recently visited San Francisco, he was verbally attacked by Cannata. Joe ridiculed all of our Company policies and *particularly those involving severity control.*

Despite his professed acceptance of Company policy when I was present at his performance evaluation last year, he really has not accepted anything . . . I feel that much of the adjuster's bad feeling toward Regional Management stems from this supervisor's extremely poor attitude. It is difficult to find enough competency in the technical aspect of his performance to warrant termination. However, in view of this continued attitude problem, and as shown by Tom Payton's 4-26 memorandum, utter disregard for his job, I recommend we terminate this man even if we have to give him six month's termination pay. I feel he is not salvageable and any further attempts through discussions with him will not change this man. He is a bad influence in the office and he is undermining everything we are attempting to accomplish." (R.T. Vol. V, 380, 831, Exhibit 5Y).

(5) In a letter, dated May 14, 1968 (seven days before his termination), from C. E. Kersgard, Sales Manager:

"It was at this point that Joe Cannata (who was sitting at a desk near the group) entered the conversation and expressed his views regarding the insurance industry and specifically the claim practices of the industry and Allstate. He further stated that the insurance companies and Allstate in particular were cheat-

ing claimants through the practice of offering quick settlements for specials and securing releases considerably below the value of the claim. I asked him to clarify this point and he did not hesitate to repeat that we were attempting to reduce our claim costs at the expense of the public and that we were not paying for pain and suffering, possible loss of wages, and other items because of our 'high pressure and fast action activities' on B.I. claims.

It became quite evident to me that this man had some strange ideas about the business and I was quite surprised to find that he supervised the handling of B.I. claims. Because of the nature of the conversation, I changed the subject and pursued individual discussions with the agents present.

Frankly, the attitude and the philosophy of this individual shocked me and made me wonder what effect this man might have on other people in the office—both claims and sales.

I feel you should be made aware of this incident for whatever action you deem necessary." (R.T. Vol. V, 389, 390, Exhibit 5AA).

(6) In a letter, dated May 17, 1968, from W. R. Brown, Zone Personnel Manager:

"We are returning your file on Joseph A. Cannata and approve your request for termination. We suggest that you and Jack Crise be personally involved in discussing the attitude incidents with Cannata so that he has no misunderstanding about the cause of this action. (R.T. Vol. V, 399, Exhibit 5BB).

(7) In the "Termination Interview" memorandum, dated May 21, 1968, (the date of plaintiff's termination when the *reasons* for his termination were stated to him), signed by J. R. Crise:

". . . Tom Payton handled the termination interview. He reviewed Joe's performance in regard to his attitude both during the time Tom Payton has been District Claim Manager and his attitude under prior District Claim Managers. Tom reminded Joe that even as late as last Thursday, he had expressed disagreement with the findings of our April In Depth survey in the presence of Casualty Adjusters in the office. Joe was advised that his attitude and failure to accept Company policy and Severity Control measures was having an unfavorable influence in the office and unfavorably influencing not only the men Joe supervised, both other adjusters. It has now reached a point that he, Tom Payton, could no longer tolerate this and that we had all agreed that in the best interests of Joe's future and the Company, he be terminated effective today, May 21, 1968 . . .

. . . I then told him that while he was a supervisor for Allstate Insurance Company the right of free speech did not extend to undermining our Severity Control programs and other policies even though he disagreed with them. Joe raised the issue that his attitude was not having an unfavorable effect on his technical performance nor the technical performance of his men. I told him that no doubt and unquestionably, it was influencing the performance not only of those men he supervised, but other men in the office. I also told him we had every right to choose whomever we wanted to supervise our employees and we chose not to have Joe Cannata do any further supervising because of his inability to accept and carry out wholeheartedly Company policies and Severity Control programs.

Mr. Potter reiterated to Joe that he was being terminated for his extremely negative attitude and his expressing of that attitude to the adjusters and others in the office."

At no time prior to the termination meeting of May 21, 1968, was Cannata given any warnings by anyone from ALLSTATE that his job was in jeopardy. (R.T. Vol. V, 401, 402). This was in violation of ALLSTATE's Personnel Regulations (R.T. Vol. VIII, 775), (R.T. Vol. XII, 1419) (R.T. Vol VIII, 776-778), Exhibit No 12). Furthermore, there was an agreement between Mr. Potter, Mr. Crise and Mr. Payton that Cannata was not to be given any notice prior to the meeting that he was going to be terminated. (R.T. Vol. XV, 1715). Mr. Payton, who was told by his superiors to tell Cannata why he was being terminated (R.T. Vol. XVIII, 2037) told him that he was being terminated for his attitude and failure to accept company policy and Severity Control measures. (R.T. Vol. XVIII, 2083). They described "plaintiff's attitude," for which he was being terminated, as being his criticizing of the ALLSTATE claims practices and policies. (R.T. Vol. V, 403).

The sole reference to unions in the entire Personnel File is one paragraph in a letter written by J. R. Crise, on May 3, 1968, wherein he refers to a hearsay statement wherein plaintiff was quoted as saying to a fellow employee that he understood the union was getting a foothold, that there was a lot of talk about a union among claims men and that he thought it might do a lot of good to have one at ALLSTATE.

When he testified concerning this part of the letter at the trial Crise said that ALLSTATE *did not have any policy against the formation of a union among its employees,* (R.T. Vol. X, 1140), and that the only reason he incorporated it into the letter was because he thought the Regional Manager (to whom the letter was addressed) should be notified of it because if their employees were talking about a union, it was a clue that they had better get out and see what the problem might be. (R.T. Vol. X, 1139, 1140).

II

History of the Case

No union is a party to this action. There is no union, either directly or indirectly involved in this case, and CANNATA was not a member of any union during the time of his employment with ALLSTATE.

The complaint does not refer in any even remote way to any union, union activity and/or any anti-union activity and/or statements on the part of ALLSTATE, nor does it charge and/or allege that respondent was terminated from his employment for any so-called "union activity or statements."

Petitioner ALLSTATE never, at any time before the judgment was rendered against it, challenged the jurisdiction of the state court or filed any document and/or pleading which inferred or alleged that the state court had no jurisdiction and/or that its jurisdiction was pre-empted by the National Labor Relations Act, but, in fact, submitted to the jurisdiction of the court and even admitted that respondent "was outside the scope of the NLRB or any correlative state agency." (Infra. R.T. Vol. I, 53).

ALLSTATE never stated, alleged or claimed that CANNATA was terminated for any so-called "union activity or statements." Furthermore, it was not until after the judgment was rendered against it, that it even argued that so-called "pro-union activity or statements" were a material factor in plaintiff's termination.

On January 6, 1971, respondent filed and served on ALLSTATE, certain Interrogatories (CT 83) in which extensive questions (Interrogatories 107 through 126) were asked concerning any misconduct of plaintiff which ALLSTATE charged and which ALLSTATE alleged were the reasons for respondent's termination. In ALLSTATE's further answers

to interrogatories, Nos. 107 through 126 (CT 149) absolutely no mention was made of any "union activity," but instead the violation of his employment contract and the reasons for his termination were stated as follows:

> "Plaintiff exhibited a continuing inability or unwillingness to understand and follow any Allstate claims handling and underwriting policies and procedures which he disagreed with. His attitude was one of reluctance and refusal to adopt such policies and procedures in his own work and develop and promote them in the work of those under his supervision."

Again, in ALLSTATE's "Supplemental Answers and Objections To Plaintiff's Second Set of Interrogatories" (CT 375), dated February 15, 1974, answering CANNATA's Interrogatory No. 108 asking for the reasons why CANNATA was terminated on May 21, 1968, ALLSTATE replied that the reasons given are "contained in the report of this interview which can be found in plaintiff's personnel file held by counsel." Again, no mention of unions or union activity.

Furthermore, in neither ALLSTATE's motion for partial summary judgment nor its motion for judgment on the pleadings (CT 476) nor in its memorandum in support thereof, heard on June 18, 1974, and denied by the court on August 1, 1974, was there any mention of CANNATA's yet unmentioned claim of "lack of jurisdiction" and/or "union activity." At the trial, ALLSTATE contended that CANNATA was *outside the scope of the National Labor Relations Act* as evidenced by the following statement of its attorney when, in preliminary argument on the law, he stated to the court:

> ". . . We said at the outset, we are not concerned in this case with any statute protecting Mr. Cannata's rights. He was a supervisor, *he was outside the scope of the NLRB* or any correlative state agency . . .". (R.T. Vol. I, 53). (emphasis ours)

During the same preliminary argument to the court, ALLSTATE's attorney informed the court of the *reason* respondent was fired when he stated:

> "But he was fired for criticizing his employer for instituting what he chose to call unlawful practices." (CT I, p. 53)
>
> ". . . because I will state that the defendant will not tender as cause for this man's discharge the failure to follow any order relating to his employment, relating to the carrying out of the insurance activities of this company. *The plaintiff was fired because he declined repeatedly to follow the defendant's suggestion that he follow proper channels in making his criticism of those practices.*" (CT I, p. 57-58).

Furthermore, a reading of ALLSTATE's Trial Brief (CT 758) can leave no doubt that the sole reason ALLSTATE terminated respondent was his criticism of certain of ALLSTATE's claim practices and policies. After setting forth five of ALLSTATE's claims practices which it states respondent criticized, the brief states:

> "With respect to most of the items, it was his position, repeatedly expressed and devoutly advocated, that the practices and procedures complained of were unlawful, immoral or unethical . . ."
>
> ". . . Defendant contends plaintiff's constant disparagement of the practices constitutes good cause for discharge. Under the issues, the most that the jury will be called upon to determine is whether on the basis of the evidence, plaintiff's criticism constituted such disloyalty as to justify his termination . . ."
>
> ". . . Plaintiff, Cannata, commencing in the third year of his employment and continuing for five years, pursued a course of constant criticism of Allstate's business policies and methods, with particular venom re-

served for Allstate's claims practices. Cannata's hostility was open, vocal and continuous . . ."

". . . A short time after taking the job with Allstate, Cannata began to criticize company policy. His criticism ran to fellow employees, his superiors and their conduct, and to the philosophy of his company. His opposition was communicated to the very persons it was his responsibility to supervise and manage in the execution of such matters. He did not direct his views to those who would affect company policies or follow procedures for bringing his thoughts to their attention . . ."

". . . The problem was recognized and brought to his attention. The need for corrective action was unequivocally conveyed. However, instead of the '100% cooperation' which he promised, Cannata continued to display his antagonism, culminating in the episode in March, 1968, when Cannata interrupted a conversation between sales agents and the visiting regional sales manager to express again his fundamental disagreements with company policies. Under the cases, Allstate had every justification for terminating him . . ." (CT 758).

In ALLSTATE's "Memorandum In Support Of Motion To Limit Evidence At Trial", it stated:

"Defendant on the other hand will be entitled to offer evidence showing that there was cause for termination. Its position on that score is that plaintiff's criticisms, by reason of their disparaging and discrediting nature, constituted a violation of his duty to his employer which warranted termination . . . it is probable that the introduction of evidence relating to Allstate's claim practices will confuse the issues . . . Defendant contends plaintiff's constant disparagement of the practices constitutes good cause for discharge. Under the issues, *the most that the jury will be called upon to determine* is whether on the basis of the evidence, plaintiff's criticisms constituted such disloyalty as to justify his termination." (CT 749).

ALLSTATE did not tell CANNATA, or even infer, that any feeling of his concerning unions had anything to do with his termination. (R.T. V, 385). On the contrary, at the termination meeting, the ALLSTATE officials told Cannata that the "attitude" he was being terminated for was his criticism of the ALLSTATE claims practices and policies. (R.T. V, 403).

Even the official termination memorandum, made on the date of plaintiff's termination on May 21, 1968, and signed by Mr. J. R. Crise, Claim Manager, stated that respondent was being terminated for his "negative attitude and failure to accept company policy and severity control measures". (R.T. V, 400, 401) (Exhibit 5CC).

Mr. Payton, plaintiff's District Service Office Manager, testified that plaintiffs was terminated for his "attitude and failure to accept company policy and severity control measures". (R.T. Vol. XVIII, 2038).

Mr. Potter, the Regional Manager, testified that plaintiff was fired for having an "extremely negative attitude" and that there was enough information recorded in plaintiff's personnel file to warrant termination. (R.T. Vol. XVI, 1708).

In spite of all of the foregoing, on Friday, August 2, 1974, four days before the commencement of the trial, ALLSTATE delivered to Cannata's counsel the four page document (R.T. XIV, Exhibit H) which an ALLSTATE employee stated she took from a file entitled "Menlo Park Regional Employees Relations File." (R.T. XIV, 1522). She allegedly just "happened" to find it in July, 1974, while looking for another document at the request of counsel for ALLSTATE (R.T. XIV, 1519). This file was in storage (R.T. XIV, 1522)

and contained most of the material concerning union activity in the zone, which was one of its purposes. (R.T. XIV, 1530).

This belatedly produced handwritten four page document (Exhibit H) has only one reference to CANNATA in connection with unions, which is as follows:

> "Tom Kelly—Menlo—Tues. 1:00 P.M., 9/5/67 Chuck Weidel—2 people in S.F. Joe Cannata Sup?? Lou Gedge dispatch adj. would be interested in organizing. Cannata's brother is a union organizer for unknown group." (R.T. X, 1144).

ALLSTATE's home office Personnel Director, William Brown, who handwrote this note, admitted that this information came to him from Mr. Kelly, who apparently got this opinion from Mr. Weidel (R.T. XIV, 1569) and that he (Mr. Brown) has no personal or firsthand knowledge of the information. (R.T. XIV, 1570).

Other than attending a discussion in 1964 (four years prior to his termination) at another adjuster's house to discuss or to speculate upon whether unionism was going to take hold in the area amongst insurance companies (R.T. XIV, 1468-1469, 1478) (a fact ALLSTATE was never even aware of until the trial), plaintiff did nothing more than admit he was in general sympathy with unions if someone would ask him. (R.T. XIV, 1470). He never did anything of an affirmative nature nor engaged in any activity concerning the forming of any kind of a union at ALLSTATE. (R.T. XIV, 1470).

The pattern for ALLSTATE's appeal began to take form when in its "MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR NEW TRIAL", filed after the judgment, it alleged as one of its "reasons" for terminating CANNATA, his so-called "advocacy of union organization". Even then, it seemed to be only considered a secondary rea-

son by ALLSTATE. In its "Memorandum of Points and Authorities in Support of Motion for New Trial", ALLSTATE stated:

> ". . . The evidence from both plaintiff and defendant was quite clear that plaintiff's termination was for persistent criticism representing in the employer's view a negative attitude and for advocacy of union organization of defendant's employee . . ."
>
> ". . . The evidence presented at trial showed clearly that plaintiff continually criticized defendant and its policies, in total disregard of whether his conduct tended to undermine company programs and employee morale. He constantly accused the defendant of dishonesty, saying that the company cheated the public and its policy holders. Such statements were made in complete disregard of the presence of impressionable junior employees. This conduct interfered greatly with the operation of defendant's business and weakened the morale of the office in which plaintiff worked.
>
> Plaintiff's conduct was a breach of his duty of faithful and loyal performance of his obligations under his contract of employment and furnished good cause to terminate plaintiff . . ." (CT 1036).

After the Court of Appeals had affirmed the judgment in favor of Cannata, and had denied ALLSTATE's Petition for Rehearing, and as its chance of disturbing the judgment were waning and appeared more remote, ALLSTATE, became more bold and reckless in its assertions and statements by asserting in its petition for a hearing in the California Supreme Court:

> "A. Since Allstate's discharge of plaintiff was arguably an unfair labor practice, California's Jurisdiction is preempted" (Petition for Hearing, p. 7), and "Discharge for such activity is precisely what the jury

found . . ." (Petition for Hearing, p. 11), and "it is Allstate's conduct—discharging Cannata for pro-union activity—which triggers preemption". (Petition for Hearing, p. 15), and "Allstate's conduct in discharging plaintiff for pro-union activity was arguably an unfair labor practice" (Petition for Hearing, p. 16), *and finally the most brazen assertion,* "It shows that plaintiff was an open advocate of unionization of Allstate employees, that he took steps to further this objective, that Allstate knew of activities and statements in this regard and that Allstate, in large part, based its decision to discharge him on his pro-union actiivties and statements." (Petition for Hearing, p. 20)

In spite of ALLSTATE's bold assertions, the record reveals evidence of only one instance of CANNATA's conduct which might possibly be considered "pro-union activity". This came to light *for the first time in the testimony, during the trial,* of Edwin Francis, an ALLSTATE claims adjuster, who related an incident concerning an invitation by plaintiff to discuss a union. (R.T. Vol. XII, 1378-1382) (R.T. Vol. IV, 1468-1470). This occurred in 1964 (R.T. Vol. XIV, 1468) four years prior to plaintiff's termination. There is no evidence that ALLSTATE was aware of this incident during plaintiff's employment, as alluded to in the argument to the jury of ALLSTATE's attorney where he stated, "this particular reason probably was not actually known to the employer". (R.T. Vol. XIX, 159, lines 25-26).

The only other evidence relating CANNATA to "unions" was his criticism of ALLSTATE's policy of requiring ALLSTATE management employees to report union activity or statements; the testimony of ALLSTATE adjuster, Joseph Manning, at the trial, that CANNATA had stated to him that "he felt unions had done a great deal for people, generally, and particularly in the trades"; the testimony at the trial of ALLSTATE adjuster, Edwin Francis, that CANNATA had expressed an opinion "favoring unions"; a paragraph in a

four page document (Defendant's Exhibit "H") taken from the "Menlo Park Employee Relations File" stating that CANNATA "would be interested in organizing"; and one paragraph in one letter (Plaintiff's Exhibit 5-Z), taken from CANNATA's personnel file, relating in part to a statement made by him that he thought it might do a lot of good to have a union at ALLSTATE. There is no evidence that ALLSTATE was ever aware of anything testified to at the trial by ALLSTATE adjusters Joseph Manning and Edwin Francis.